

In the High Court of Punjab and Haryana, Chandigarh

C.W.P. No. 1619 of 1989

Date of Decision: 13.12.2006

Lt Col. (Now Major) Gian Singh Dhillon

...Petitioner

Versus

Union of India & others

...Respondents

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR

PRESENT: Mr. Gurnam Singh, Advocate,
for the petitioner.

Mr. Gurpreet Singh, Central Govt. Standing Counsel,
for the respondents.

JUDGMENT

M.M. KUMAR, J.

The prayer made in this petition filed under Article 226 of the Constitution is for quashing General Court Martial proceedings held against the petitioner, which were convened under the orders of the General Officer Commanding, 8 Mountain Division C/o 99 APO-respondent No. 3. The principal ground for quashing is that respondent No. 3 lacked substantive jurisdiction to convene the Court Martial as he was not competent to order the trial because the petitioner was on deputation to Assam Rifles.

Brief facts of the case are that the petitioner was granted Emergency Commission in the Army by the President of India in October, 1963. After serving for more than 20 years, he was selected and promoted to the rank of Lieutenant Colonel in the year 1983 and was posted on deputation to Assam Rifles. It is claimed that Assam Rifles is a force raised and maintained under the authority of the Central Government independent of Army. Accordingly, he took over the command of 14 Assam Rifles on 4.7.1983. It has been asserted that during his deputation with Assam Rifles, the petitioner for all purposes belonged to and become part and parcel of Assam Rifles and, therefore, was subject to the jurisdiction and control of Assam Rifles only, which was outside the jurisdiction of Army Commanders and Authorities.

When the petitioner was on deputation certain irregularities were pointed out against him, which were proceeded with and investigated by a Court of Inquiry. During the course of inquiry certain officers deposed against the petitioner, which finally culminated into Court Martial of the petitioner. Three out of four charges were punishable under Section 63 of the Army Act, 1950 (for brevity, 'the Act'). It is appropriate to mention that the first charge against the petitioner was that he had torn off 2/3 pages from the official register. He was not found guilty on that count. The second charge was for permitting sale of liquor from the Unit Canteen to civilians. The third charge was that the petitioner while commanding 14 Battalion Assam Rifles improperly omitted to ensure depositing of

Rs. 2,637/-, the sale proceeds of 1200 surplus gunny bags in the Government treasury. The fourth charge was that the petitioner absented himself without leave from the Assam Rifles Training Centre, Dimapur, from 25 to 26 February, 1986. The petitioner pleaded guilty to the 2nd, 3rd and 4th charge. During the proceedings of General Court Martial, the petitioner was found guilty of three charges out of four and the General Court Martial awarded the following punishments to the petitioner:-

- “a) Forfeitures: To forfeit 4 years past service for the purpose of pension.
- b) Severe reprimand: To be severely reprimanded.
- c) Stoppage: To be put under stoppage of pay and allowances until he has made good the sum of Rs. 2637/- (Rupees two thousand six hundred thirty seven only) in respect of the sale proceeds of 1200 surplus gunny bags.”

His Pre-confirmation petition was rejected by the Confirming Authority on the ground that it lacked substance and the findings were confirmed along with the sentence on 28.4.1988. The sentence was promulgated on 11.7.1988 by sending a Registered A.D. letter of that date.

The petitioner has claimed that since he was posted to Assam Rifles Training Centre as Officer Commanding Training Battalion prior to the trial by the General Court Martial, the Army has no administrative or disciplinary control. The petitioner was initially

attached to Headquarter Nagaland Range (Southern Sector) by respondent No. 5, vide letter dated 27.1.1986, however, the attachment order was cancelled on 27.2.1986. It is claimed that the Director General of Assam Rifles alone was empowered to convene the Court Martial and not any Army Authority. A copy of the convening order, dated 14.1.1988 (P-1) makes a mention that the petitioner belonged to Assam Rifles Training Centre Dimapur and was attached with Headquarters 5 Sector, which is the other name of Headquarter Nagaland Range (Southern Sector), therefore, he was not under the control of any Army Authority. The petitioner has also placed reliance on a Division Bench judgment of Gauhati High Court in his own case arising out of the instant Court Martial, titled as Lt. Colonel G.S. Dhillon v. Union of India and others, 1987 Labour Industrial Cases 1264 (R-IV).

Maintainability of the Writ Petition:

A preliminary objection on the basis of the territorial jurisdiction of this Court has also been raised by the learned counsel for the respondents by arguing that no part of cause of action has arisen within the territorial jurisdiction of this Court as trial was held at Guwahati in Kohima (Nagaland). The charges were read out and the evidence was recorded there. In support of his submission, learned counsel has placed reliance on a Division Bench judgment of this Court in the case of **Ravinder Singh v. FCI, 2003 (2) SCT 706**, and argued that even if promulgation of the order passed by the respondents is to be made then the promulgation would be complete

when the order imposing the punishment on the petitioner is issued by the authority and it is beyond the control of the afore mentioned authority. The receipt of the order by the petitioner would be insignificant and it would not be part of bundle of facts which constitute cause of action as nothing would be required to be done by the petitioner on the receipt of the order like relinquishing of charge or any further step in that direction.

However, Mr. Gurnam Singh, learned counsel for the petitioner has rebutted the preliminary objection by citing the provisions of Rule 71 of the Army Rules, 1954 (for brevity, 'the Rules) read with para 473 of the Army instructions. According to the learned counsel, Rule 71 of the Rules imposes an obligation on the respondent that the charge, finding, sentence and any recommendation of mercy together with confirmation or non-confirmation of the proceedings are required to be promulgated in such a manner as the confirming authority may direct. In the absence of any direction, the promulgation has to be according to the prevalent customs concerning service. He has further submitted that the Rule further stipulates that until promulgation has been effected confirmation is not complete and that the finding and sentence could not be held to have been confirmed until they have been promulgated. Mr. Gurnam Singh, learned counsel has further submitted that the view taken by the Division Bench of this Court in Ravinder Singh's case (supra) is not applicable to the case of the petitioner because confirmation of order of sentence is not complete until it is

promulgated and there cannot be any promulgation until the order is received by the petitioner.

Before opining on merit it would be appropriate to first dealt with the preliminary objection regarding maintainability of the petition on the ground of lack of territorial jurisdiction. I am of considered view that the preliminary objection is liable to be rejected. In that regard a reference may be made to Rule 71 of the Rules and para 473 of the Army Instructions, which are reproduced hereunder for facility of reference:-

Rule 71 of the Rules:

“ 71. Promulgation. – The charge, finding, and sentence, and any recommendation to mercy shall, together with the confirmation or non-confirmation of the proceedings, be promulgated in such manner as the confirming authority may direct; and if no direction is given, according to the custom of the service. Until promulgation has been effected, confirmation is not complete and the finding and sentence shall not be held to have been confirmed until they have been promulgated.”

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“473. Promulgation. – (a) The charge(s), finding, sentence, recommendations to mercy, if any, and confirmation or non-confirmation of the proceedings of a court-martial will be promulgated in all cases to the

accused in the manner stated below. The date of promulgation will be recorded on the proceedings:-

- (i) Officers. – The details of the proceedings will be read out to the accused by his formation commander in the presence of his commanding officer and such other officers of his staff as he considers necessary. If he has been sentenced to cashiering or dismissal, he will be stripped of his badges of rank and all regimental insignia.
- (ii) JCOs, WOs and OR. – The details of proceedings will be read out to the accused by his commanding officer in the presence of the Adjutant and the senior JCO of the unit. If he has been sentenced to dismissal or to be reduced to the ranks or to a lower rank or grade he will be stripped of his badges of rank and other regimental insignia.

The promulgation of General and District Courts Martial proceedings in units commanded by officers below the rank of Major will be done by formation commanders.

If the confirmation authority thinks fit, he may order the promulgation to take place at a place at a

parade in such form as he decides. In cases of Summary Courts Martial, the Commanding Officer of the unit may order the promulgation to be carried out at a parade.

(b) The result of all courts-martial will be published in the orders of all formations in which the notice of the convening of the court appeared. In every case such results will be published in the orders of the unit concerned, in Part I orders in the case of Officers and in Part II Orders in the case of JCOs. WOs and OR, (see para 584).

(c) If, subsequent to conviction but before promulgation can be effected, an accused absents himself, and a declaration by a court of inquiry under Section 106 of the Army Act is made in respect thereof, the proceedings of the court-martial may be promulgated by the publication of the foregoing particulars, in the case of an officer in Part I Orders and in the case of a JCO, WO or OR in Part II Orders of the unit. They will, however, forthwith be communicated to the accused on his apprehension (if liable for further service) or surrender.”

A perusal of Rule 71 of the Rules would show that the charge, finding, sentence and any recommendation concerning mercy together with confirmation or non-confirmation of the proceedings are required to be promulgated in such manner as the confirming

authority may direct. In the absence of any direction by the confirming authority it has to be done according to the custom of the service. It is only on effective promulgation that confirmation is to be considered as complete. The finding and sentence cannot be considered to be confirmed until they have been promulgated. Sub-para (b) of para 473 of the Army Instructions contemplates that the result of all courts martial is to be published in the orders of all formations in which the notice of convening of the court appeared. According to sub-para (c) of para 473 of the Army Instructions it has been postulated that after conviction but before promulgation could be effected if an accused absents himself, the proceedings of the court martial are required to be promulgated by publication of various particulars and that it is required to be communicated to the accused forthwith on his apprehension or surrender.

In the present case, order of sentence was passed on 11.7.1988 in Nagaland, which was communicated to the petitioner subsequently at Mohali (District Ropar). The promulgation could not be deemed to be effected until and unless the confirmation was complete. The finding and sentence cannot also be held to be confirmed until they have been promulgated as has been provided by Rule 71 of the Rules. Therefore, it has to be concluded that a part of cause of action as provided by Article 226(3) of the Constitution has become available to the petitioner on confirmation and promulgation of the order dated 11.7.1988 (P-5), which has been later communicated to him at Mohali (District Ropar), which is within

territorial jurisdiction of this Court. Therefore, the preliminary objection raised in respect of the territorial jurisdiction of this Court is hereby overruled and I hold that the writ petition deserves to be heard on merit. It may be mentioned that the Division Bench judgment of this Court in Ravinder Singh's case (supra) has no application to the facts of the present case in view of specific Rule 71 of the Rules and para 473 of the Army Instructions, which lead to an inference that a part of cause of action has arisen within these jurisdiction.

Mr. Gurnam Singh, learned counsel for the petitioner has raised two contention (a) he has submitted that the petitioner was on deputation with Assam Rifles and, therefore, the only authority which could have convened the General Court Martial was the Assam Rifles not the Army Authorities. For the aforementioned purpose he has placed reliance on Section 8, 191, 192 and 193 of the Act. His second submission is that the General Court Martial suffer from a legal infirmity, inasmuch as, it has been convened by Junior Officer Commanding rather than by Major General GOC 8 Mountain Division. In that regard, he has placed reliance on Rule 37(1)(2) & (4) of the Rules. He has also placed reliance on the judgments of Hon'ble the Supreme Court in the cases of **Inderjit Kumar v. Union of India**, AIR 1997 SC 2085 and **Union of India v. Harish Chandra Goswami**, AIR 1999 SC 1940.

On the other hand Mr. Gurpreet Singh, learned counsel for the respondents has argued that the order convening the Court

Martial clearly shows that the same was convened by the Major General and no objection, in fact, was taken by the petitioner. Learned counsel has also referred to the forms stating that where no plea has ever been taken then no consequence was to follow. He has placed firm reliance on para 18 of the judgment of Hon'ble the Supreme Court in the case of Major G.S. Sodhi v. Union of India, AIR 1991 SC 1617. He has also placed reliance on Section 4 of the Act and argued that Inspector General, Assam Rifles was under the direct control of the Army at the relevant date and time. He has placed reliance on statutory Rules and Orders SRO 318325. He has also placed reliance on two judgments of Hon'ble the Supreme Court in the cases of **Union of India v. Himmat Singh Chahar**, AIR 1999 SC 1980 (para 5) and **Union of India v. A. Hussain**, AIR 1998 SC 577 (para 20).

The power to convene a General Court Martial is provided by Section 109 of the Act, which is reproduced hereunder:-

“109. Power to convene a General Court Martial. – The General Court Martial may be convened by the Central Government or the Chief of the Army Staff or by an officer empowered in this behalf by warrant of the Chief of the Army Staff.”

The aforementioned provision fell for consideration of Hon'ble the Supreme Court in the case of Inderjit Kumar (supra). The view of their Lordship is discernible from para 13 wherein it is observed that it is not essential for the Chief of the Army Staff to

issue warrant for convening court-martial in each specific case but a general warrant is sufficient. Para 13 is reproduced for a ready reference:-

“.....Under Section 109 of the Army Act, the General Court Martial may be convened by the Central Government or the Chief of the Army Staff or by any officer empowered in this behalf by warrant of the Chief of the Army Staff. There is nothing in Section 109 which requires the Chief of the Army Staff to issue a warrant for each specific case. A general warrant issued by the Chief of the Army Staff, as in the present case, is competent under Section 109.”

In the present case, it is not disputed that General Officer Commanding (GOC) 8 Mountain Division had the authority to convene a General Court Martial on the strength of general warrant. The petitioner has raised the plea in the writ petition that respondent No. 3 i.e. General Officer Commanding, 8 Mountain Division, did not have the jurisdiction to convene the Court Martial since the petitioner was on deputation to Army Rifles and the authority to convene the Court Martial was the Inspector General, Assam Rifles i.e. respondent No. 4. It would be relevant to mention that in para 6 of the petition, the petitioner has pleaded that the General Officer Commanding, 8 Mountain Division (respondent No. 3) had convened the Court Martial in respect of the petitioner although he did not have the jurisdiction to do so. Thereafter, another plea was raised by filing an

application asserting that the convening order Annexure P-1 is found to be signed by a Ltd. Col. i.e. Assistant Adjutant General for General Officer Commanding (GOC) 8 Mountain Division and not by GOC himself asserting that it is mandatory requirement. It is alleged that there is nothing to show that there had been application of mind by the GOC and, as such, entire Court Martial proceedings are vitiated and the petitioner has relied upon the judgment of Hon'ble the Supreme Court in the case of Harish Chandra Goswami (supra).

The respondent, on the other hand, has submitted that nowhere, during the trial or in the writ petition, the plea of irregularity in the convening order had been raised to the effect that the GOC, 8 Mountain Division, had not signed on the convening order. On the contrary, the case of the petitioner, as per his pleadings, is that the convening order had been issued by the GOC, 8 Mountain Division. Rule 37 of the Rules deals with convening of General Court Martial, which is reproduced as under:-

“37. Convening of General and District Court Martial.

(1) The officer before convening a General or District Court Martial shall first satisfy himself that the charges to be tried by the Court are for offences within the meaning of the Act and that the evidence justifies a trial on those charges, and if not so satisfied, shall order the release of the accused, or refer the case to the superior authority.

(2) He shall also satisfy himself that the case is a proper one to be tried by the kind of court-martial which he proposes to convene.

(3) The officer convening a Court Martial shall appoint or detail officer to form the Court and may also appoint or detail such waiting officer as he thinks expedient. He may also, where he considers the service of an Interpreter to be necessary, appoint or detail an Interpreter to the Court.

(4) The officer convening a court-martial shall furnish to the senior member of the court with the original charge-sheet on which the accused is to be tried and, where no judge-advocate has been appointed, also with a copy of the summary of evidence and the order for the assembly of the court-martial. He shall also send, to all the other members, copies of the charge-sheet and to the judge-advocate when one has been appointed, a copy of the charge-sheet and a copy of the summary of evidence.”

It would be necessary to reproduce the Note mentioned in the Form for convening the General Court Martial annexed to the Rule wherein there is an endorsement that the convening order must be signed by the officer personally or for him by a Staff Officer. The Note is reproduced here-in-below:-

“The convening order must be signed by the Convening Officer personally or “for” him by a Staff officer authorized by the custom of service to sign his orders, or by a staff officer as such. The date of convening order must not be prior to the date on which the order for trial was endorsed by the Convening Officer on the charge sheet.”

The above mentioned form/Note was duly approved by Hon’ble the Supreme Court in the case of **Maj. G.S. Sodhi v. Union of India**, AIR 1991 SC 1617, in para 18 which is reproduced for facility of reference:-

“18. Now we shall advert to some of the submissions about the alleged defects in the general court martial. Under Section 109 of the Act, a General Court Martial can be convened by the Central Government or the Chief of the Army Staff or by an officer empowered in this behalf by warrant of the Chief of the Army Staff. It is submitted that GOC 9 Infantry Division could not have ordered the general court martial because GOC had examined and studied the GOI and given investigative directions for initiation of a disciplinary action and have recorded a SOE. It is also submitted that warrant for convening the general court-martial does not authorize a Staff officer to sign the convening order. Even otherwise the convening order had been signed in a

mechanical way and it is not in the name of concerned person in office. It is also submitted that on 4th May, 1989 Col. S.K. Maini informed the petitioner about his court martial to be held on 15th May, 1989 whereas the petitioner was issued a charge sheet on 8th May, 1989 and that general court martial was convened on 15th May, 1989 whereas Col. S.K. Maini had already detailed court composition on 10th May, 1989. The learned counsel relied on Note 3b to Section 109 at page 361 of the book wherein it is stated that if the officer on whom the command devolves is the commanding officer of the person to be tried or an officer who has investigated the case, he cannot afterwards act as convening officer in the same case but must refer it to a superior authority. The submission is that the General Officer Commanding 9 Infantry Division because of the above steps taken by him must be deemed to have investigated the case, therefore, he could not have convened the general court-martial. From the record we find the order convening the general court-martial is signed by D.M. Jadhav, Lt. Col. for General Officer Commanding 9 Infantry Division. It is stated that he is the Principal Staff Officer. From this endorsement, it can be seen that he has signed for the General Officer. In the form for convening the general court-martial annexed to the Rules, we find an

endorsement to the effect that the convening order must be signed by the officer personally or for him by a Staff Officer. Therefore, there is no noticeable defect because the convening order is ultimately deemed to have been signed by a superior officer namely General Officer and not the Officer who investigated the case.”

Admittedly, in the instant case, the petitioner has not raised any plea regarding violation of Rule 37(3) of the Rules and even in the pre-confirmation petition such plea has not been raised. The reason is obvious that it has been the case of the petitioner that the convening order was passed by the GOC 8 Mountain Division. Rule 41 of the Rules postulates as to how the Court Martial proceedings are required to be commenced. On the court assembling, the order convening the Court is laid before it together with the charge sheet and summary of evidence and also the ranks, names and corps of the officers appointed to serve on the court and the court is then to satisfy itself that it is legally constituted. Rule 44 of the Rules says that the order convening the court and the names of the Presiding Officer are to be read over to the accused and he is to be asked whether he has any objection of being tried by any officer sitting on the court. If the accused raises any objection then the same is to be considered and disposed of in accordance with the Rules. There has been absolutely no plea of violation of Rule 37. In that regard reliance is placed on the Division Bench judgment of High Court of Himachal Pradesh in the case of **Rajmal Sharma v. Union of India**,

1998(4) SLR 547, wherein it has been held that if a plea has not been raised, no foundation has been laid and the issue has not been dealt with by the authorities below, then there is no material for exercising the power of judicial review. Para 9 of the judgment is reproduced as under:-

“9. It is to be pointed to that there is no presumption of illegality. The relevant rules are Rules 41 and 42. Under the said Rules, on the Court assembling, the order convening the Court shall be laid before it together with the charge sheet and summary of evidence or a true copy thereof and also the ranks, names and corps of the officers appointed to serve on the court and the Court shall then satisfy itself that it is legally constituted. The Court shall further, if a judge-advocate has been appointed, ascertain that the judge-advocate is duly appointed and is not disqualified for sitting on the Court Martial. If the Court is not satisfied with regard to the compliance of the said report, it shall report its opinion to the convening authority and adjourn for that purpose. Similarly, the Court should be satisfied that the requirements of Rule 41 have been complied with and if it is not satisfied on the above matter, it shall report its opinion to the convening authority and adjourn for that purpose. Hence, when the Court Martial has proceeded further with the enquiry after seeing the records placed

before it, a presumption will arise that the Court Martial was satisfied that it as legally constituted. Section 114 (e) of the Evidence Act will apply in this case as all official acts are presumed to have been done in the proper manner. It is for the petitioner to raise an objection specifically before the concerned Authority and point out that the appointment as not made by the competent authority. According to learned counsel, it is a question of jurisdiction and it can be raised at any time and even under Article 226 of the Constitution of India. But it is forgotten that the jurisdiction depends upon a particular fact and the non-existence of such a fact must be alleged and pleaded. In the present case no such factual plea that the appointment order was not made by the competent officer was raised before the concerned Court Martial. It cannot be raised before us under Article 226 of the Constitution of India.”

The petitioner has mainly relied upon the judgment of Hon’ble the Supreme Court in the case of Harish Chandra Goswami (supra) wherein it has been held that failure to show the record when the members of the Court Martial were or nominated by the officer competent to convene the court martial would vitiate the court martial proceedings. In nutshell, there should be some record to show the application of mind by the officer competent to convene the court martial. The record of General Court Martial, which has been

produced before me shows that the Court Martial was convened by Major General Talwar Harjit Singh, General Officer Commanding, 8 Mountain Division. The convening order, dated 14.1.1988, is Ex. 'K' on the original file bearing No. 6/88/AF. The judgment in Harish Chandra Goswami's case (supra) would not be of any assistance to the petitioner in view of the case built up by him wherein he has not challenged that GOC 8 Mountain Division did not convene the court martial. In the writ petition, he specifically pleads that the court martial was convened by GOC 8 Mountain Division but his grievance is that it should have been convened by the Inspector General Assam Rifles since he was on deputation. The petitioner has also not challenged the composition of the members of the court martial on the ground that they have not been duly nominated by the GOC 8 Mountain Division i.e. plea of non-application of mind. Since the petitioner has not raised this plea before the court martial, the same was not dealt with. Even in the pre-confirmation petition, dated 10.2.1988, the said plea has not been raised. The writ petition had been filed in the year 1988 and it is only after 18 years that the petitioner has filed a Miscellaneous Application, dated 28.8.2006, wherein he has now raised plea that the convening authority has himself not signed the convening order.

There is another aspect of the matter. On the repeated query made by the Court, learned counsel for the petitioner was not able to substantiate that any prejudice has been caused to him on account of any irregularity committed in convening the court martial

including the non-signing of warrant by the GOC. It is well settled that a trial by court martial is to vitiate only if there has been infraction of any mandatory provisions of the Act, which may result into gross miscarriage of justice. In that regard reliance has rightly been placed by the respondents on para 5 of the judgment of Hon'ble the Supreme Court in Himmat Singh Chahar's case (supra) and para 20 of the judgment in A. Hussain's case (supra).

For the reasons aforementioned, this petition fails and the same is dismissed.

December 13, 2006

Pkapoor

(M.M. KUMAR)
JUDGE

FIT FOR INDEXING